In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-638

WASHINGTON TRUST BANK, as Trustee of the Endowment Fund of Greenwood Memorial Terrace Company, PETITIONER

v.

UNITED STATES OF AMERICA

EVERGREEN CEMETERY ASSOCIATION OF SEATTLE, a corporation, PETITIONER

v.

UNITED STATES OF AMERICA

ON JOINT PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the district court (Pet. App. A 7-24) and the court of appeals (Pet. App. A 2-5) in the *Washington Trust* case are reported at 301 F. Supp. 713 and 444 F. 2d 1235, respectively. The opinions of the district court (Pet. App. A 25-36) and the

court of appeals (Pet. App. A 1) in the *Evergreen* case are reported at 302 F. Supp. 720 and 444 F. 2d 1232, respectively.

JURISDICTION

The judgments of the court of appeals were entered on July 7, 1971. Petitions for rehearing were denied on August 13, 1971. The joint petition for writs of certiorari was filed on November 10, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners failed to qualify as "[c]emetery companies" within the meaning of Section 501 (c)(13) of the Internal Revenue Code of 1954, and therefore were not exempt from federal income taxation.

STATUTE INVOLVED

The pertinent provisions of Section 501 of the Internal Revenue Code of 1954 are set forth in the petition (Pet. 3-4).

STATEMENT

The law of the State of Washington (the situs of each of the cemetery properties here involved) requires that 10 percent of the sale price of each cemetery lot sold in that State be set aside by the cemetery company and invested, and that the income from the fund corpus be used exclusively for the perpetual care and maintenance of the cemetery grounds and

lots. To comply with these requirements, each of the cemetery companies here involved (the "operating companies") arranged to have the care fund held by a separate entity. One of the operating companies created a trust, with petitioner Washington Trust Bank as trustee. The other organized a non-profit corporation, petitioner Evergreen Cemetery Association. Each of the operating companies was a profit-oriented cemetery company established to subdivide a large tract of land into cemetery lots, to develop the overall cemetery property, to sell the lots for current and future burial purposes, and to provide burial and related services when needed. (Pet. App. A 27-28.)

Each year, in accordance with Washington law, the income of the perpetual care funds administered by each of the petitioners was paid over to its respective operating company, which undertook to perform the actual maintenance work. From the outset, and throughout the years in issue, the income of each fund was insufficient to meet the annual costs of care and maintenance of the respective cemeteries. The balance was underwritten, in each case, by the operating company. (Pet. App. A 14, 31, 34.)

In 1963, petitioner Washington Trust Bank sold appreciated investment properties at a gain. Petitioner Evergreen Cemetery Association made similar profitable sales in 1963 and 1964. Both claimed that they were exempt from tax as "[c]emetery companies" not operated for profit within the meaning of Section 501(c)(13) of the Internal Revenue Code of 1954 and, therefore, that they were not liable for capital gains taxes. The Commissioner assessed de-

ficiencies, and petitioners, after paying the taxes in dispute, brought separate suits for refund. (Pet. App. A 12-14, 32.)

The district courts, both within the jurisdiction of the Ninth circuit, reached contrary results. The Commissioner's determination was sustained in the *Evergreen* case (Pet. App. A 25-36), and rejected in *Washington Trust* (Pet. App. A 7-24). The court of appeals, although agreeing with petitioners that they were not to be considered merely as parts of their respective profit-seeking operating companies, held that petitioners were not "[c]emetery companies." It accordingly affirmed in *Evergreen* (Pet. App. A 2-5) and reversed in *Washington Trust* (Pet. App. A 1).

ARGUMENT

The decision below is correct. There is no conflict or any other reason for further review.

1. In holding that petitioners were not "[c]emetery companies" under Section 501(c)(13), the court of appeals reached the only result compatible with the unequivocal language of the statute, given the Court's conclusion (Pet. App. A 4) that petitioners were separate and distinct from their respective operating companies. It is undisputed that petitioners did not perform the range of services provided by what is commonly understood to be a cemetery company. For this reason, they did not qualify for exemption.[1]

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[1] Petitioners set out separately (Pet. 3) the question whether Evergreen Cemetery Association is a "cemetery corporation" under Section 501(c)(13). Since a cemetery corporation is merely one type of cemetery company, the issue in the two cases is identical for purposes of legal analysis. See Pet. App. A 1.

2. While the issue here is administratively important, there is no present conflict in the circuits warranting review by this Court. In *Mercantile Bank & Trust Co.* v. *United States*, 441 F. 2d 364, with which petitioners claim conflict in "rationale" (Pet. 12), the Eighth Circuit held that the taxpayer was not an exempt cemetery company. Whatever differences in theory there may be between the opinions in the two circuits, it seems clear that the Eighth Circiut would have reached the same result in the instant cases that the Ninth Circuit reached.

As for *Metairie Cemetery Association* v. *United States*, 282 F. 2d 225 (C.A. 5), and *Monte Vista Burial Park, Inc.* v. *United States*, 340 F. 2d 595 (C.A. 6), with which petitioners also assert conflict (Pet. 14-15), it is enough to point out that in neither case was the interpretation of Section 501(c)(13), or the definition of a cemetery company, even at issue. Moreover, since the court below held (Pet. App. A 4) that petitioners were to be considered independently, and not merely as parts, of their respective operating companies, the decision here is fully consistent with the cited cases, insofar as they stand for the proposition that an operating company and a trust fund are separate and distinct.[2]

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[2] Under the approach taken in Rev. Rul. 58-190, 1958-1 Cum. Bull. 15, and Rev. Rul. 64-217, 1964-2 Cum. Bull. 153, an entity administering a care fund may be treated as part of the operating company. If so treated, it would qualify for tax exemption if the operating company was tax exempt. But both the court below and the Eighth Circuit in *Mercantile Bank & Trust Co., supra*, declined to follow this approach. Accordingly, they would deny tax exempt status to an entity

3. The legislative history upon which petitioners rely (Pet. 16, n. 1) does not support their contention (Pet. 15-16) that the congressional purpose of Section 501(c)(13) was merely to encourage cemetery maintenance. Rather, it shows that it was to provide tax exemption to cemetery companies not operated for profit—those engaged in the full range of the potentially profitable business of providing lots, burials, etc., which dedicate all of their income to cemetery care and maintenance. Congress did not contemplate that a partial exemption would be available, where, as here, only a fraction of the total income is dedicated to the exempt purpose. Thus, if the perpetual care function is retained within the basic profit-seeking cemetery company, tax exemption is unavailable because the company is operated for profit; if that function is split off from a full profit-seeking cemetery operation, the split-off segment cannot qualify for tax exemption because it is not, by itself, a cemetery company within the meaning of the statute.

4. Finally, there is no support cited for petitioners' predictions (Pet. 11-12) that the holding below will result in the progressive inability of care funds to

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exercising the limited functions carried on by petitioners—even if the related operating company was tax exempt—on the ground that such an entity simply is not a cemetery company. At all events, petitioners are not helped by the revenue rulings, since the operating companies concededly were organized and operated for profit, and since the amounts paid to them by petitioners directly contributed to their profits by relieving them of the need to use their own funds to maintain the kind of cemetery appearance which is essential to the sale of lots. See Pet. App. A 28.

perform their function. In any event, to the extent that petitioners' fears that cemeteries will fall into disrepair are realistically grounded, they undoubtedly are shared by the operating companies which will take the necessary steps to maintain the cemeteries, if for no other reason than to insure continuing sales. With regard to the situation that may exist after all of the lots have been sold and the operating companies go out of business (Pet. 13, 18), it is to be noted that the court below expressly declined to rule on the availability of tax exemption under those future circumstances (Pet. App. A 5), and there is no need for this Court to do so at this time.

CONCLUSION

The joint petition for writs of certiorari should be denied.

Respectfully submitted.

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